

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

## UNITED STATES PATENT AND TRADEMARK OFFICE

### BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Ex parte ANDREW CAPON, DAVID K. FRIDAY and DAVID W. PIKE



Appeal No. 2006-0605  
Application No. 10/604,497

HEARD: JUNE 8, 2006

Before OWENS, CRAWFORD, and LEVY, Administrative Patent Judges.  
CRAWFORD, Administrative Patent Judge.

#### DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 and 7 to 13. Claims 2 to 6 stand objected to as depending from a rejected claim and are not a subject of this appeal.

The appellants' invention relates to a gas mask filter which has multi-stage filtration cartridges with a toxic industrial material filter (specification, p. 1). A copy of the claims under appeal is set forth in the appendix to the appellants' brief.

PRIOR ART

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Klusewitz et al. (Klusewitz)	3,142,549	Jul. 28, 1964
Sundström	5,158,077	Oct. 27, 1992
Newton	5,660,173	Aug. 26, 1997

THE REJECTIONS

Claims 1 and 7, 9 and 11 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Klusewitz.

Claim 8 stands rejected under 35 U.S.C. § 103 as being unpatentable over Klusewitz in view of Sundström.

Claim 10 stands rejected under 35 U.S.C. § 103 as being unpatentable over Klusewitz in view of Newton.

Claims 12 and 13 stand rejected under 35 U.S.C. § 103 as being unpatentable over Klusewitz.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejections, we make reference to the answer (mailed May 17, 2005) for the examiner's complete reasoning in support of the rejections, and to the brief (filed March 7, 2005) and reply brief (filed July 15, 2005) for the appellants' arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art references, and to the respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the determinations which follow.

We turn first to the examiner's rejection of claims 1 and 7, 9 and 11 under 35 U.S.C. § 102(b) as anticipated by Klusewitz. The examiner's findings regarding this rejection can be found on pages 3 to 6 of the answer.

The appellants argue that Klusewitz does not describe a filter that is adapted to filter toxic industrial material. The appellants have filed a declaration pursuant to 37 CFR § 132 by David Pike, who is one of the named inventors. Mr. Pike states that a person of ordinary skill in the art would know as early as April 18, 200 that toxic industrial materials are gaseous materials that would not be removed by the Klusewitz filter. Attached to the Pike declaration, as exhibit C, is a National Institute of Justice document entitled "Guide for the Section of Chemical Agent and Toxic Industrial

Material Detection Equipment for Emergency First Responders" that defines toxic industrial chemicals as a specific type of industrial chemical i.e. one that has a lethal concentration of fifty percent of the population multiplied by exposure time less than 100,000 mg-min/m<sup>3</sup> in any mammalian species and is produced in quantities exceeding 30 tons per year at one production facility.

We will not sustain this rejection because Klusewitz does not disclose a filter adapted to filter toxic industrial materials. In this regard we disagree with the examiner that the paint fumes filtered by the Klusewitz device are toxic industrial materials. Rather, toxic industrial materials are only those materials that fall into the definition above. Nor is it our opinion that the examiner has established that the prefilter 9 of Klusewitz, which is formed of paper or cotton (col. 2, lines 54 to 55) is capable of filtering gaseous materials which, according to the Pike declaration primarily make up toxic industrial materials (Pike declaration paragraph 12).

In view of the foregoing, we will not sustain this rejection.

Likewise, we will not sustain the remaining rejections of claims 8, 10, 12 and 13, as each of the remaining rejections relies on the disclosure of Klusewitz for disclosing a filter media for filtering toxic industrial material and we have examined the disclosures of Sundström and Newton and found that these references do not cure the deficiency of Klusewitz.

The decision of the examiner is reversed.

**REVERSED**

*Terry J. Owens*  
**TERRY J. OWENS**  
Administrative Patent Judge

MURRIEL E. CRAWFORD  
Administrative Patent Judge

STUART S. LEVY  
Administrative Patent Judge

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